

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOHN AUBRY TURNER,

Petitioner,

v.

KIM HOLLAND, Warden, California  
Correctional Institute,

Respondent.

CASE NO. 3:14-cv-1966-GPC-NLS

**ORDER:**

**(1) DENYING PETITIONER'S  
MOTION TO FILE  
SUPPLEMENTAL EVIDENCE;**

[ECF No. 27]

**(2) DENYING PETITIONER'S  
MOTION FOR TEMPORARY  
RESTRANING ORDER AND/OR  
PRELIMINARY INJUNCTION;**

[ECF No. 24]

**(3) OVERRULING PETITIONER'S  
OBJECTIONS;**

[ECF No. 26]

**(4) ADOPTING MAGISTRATE  
JUDGE STORMES'S REPORT  
AND RECOMMENDATION;**

[ECF No. 25]

**(5) GRANTING RESPONDENT'S  
MOTION TO DISMISS**

[ECF No. 7]

**I. INTRODUCTION**

Petitioner John Aubry Turner ("Petitioner") proceeds pro se in this habeas corpus

1 matter pursuant to 28 U.S.C. § 2254. On October 3, 2014, Respondent Kim Holland  
 2 (“Respondent”) filed a Motion to Dismiss. (ECF No. 7.) On December 19, 2014,  
 3 Petitioner filed a Motion for Temporary Restraining Order and/or Preliminary  
 4 Injunction. (ECF No. 24.) On January 21, 2015, Magistrate Judge Nita L. Stormes  
 5 issued a Report and Recommendation (“R&R”) recommending that this Court grant  
 6 Respondent’s Motion to Dismiss. (ECF No. 25.) On February 5, 2015, Petitioner filed  
 7 objections to the R&R. (ECF No. 26.) On April 2, 2015, Petitioner filed a Motion to  
 8 File Supplemental Evidence. (ECF No. 27.)

9 Nothing in petitioner’s alleged supplemental evidence is new evidence. First,  
 10 petitioner has created anagrams based on the names of judges and law enforcement  
 11 officers. (*See* ECF No. 27.) That is not evidence and therefore the Court does not  
 12 consider it. Additionally, based on the dates on the documents cited by Petitioner, all  
 13 of the alleged evidence was available prior to the objection filing deadline issued by  
 14 Magistrate Judge Stormes and Petitioner has failed to show good cause for presenting  
 15 this alleged evidence prior to that deadline. Accordingly, the Court DENIES Plaintiff’s  
 16 motion to file supplemental evidence. After a review of the R&R, briefs, evidence, and  
 17 applicable law, the Court: (1) DENIES Petitioner’s motion for injunctive relief, (2)  
 18 OVERRULES Petitioner’s objections, (3) ADOPTS the R&R, and (4) GRANTS  
 19 Respondent’s motion to dismiss.

## 20 **II. LEGAL STANDARD**

21 The district court’s role in reviewing a magistrate judge’s report and  
 22 recommendation is set forth in 28 U.S.C. § 636(b)(1). Under this statute, the district  
 23 court “shall make a de novo determination of those portions of the report . . . to which  
 24 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings  
 25 or recommendations made by the magistrate judge.” *Id.* When the parties do not object,  
 26 a district court may assume the correctness of the magistrate judge’s findings of fact  
 27 and decide the motion on the applicable law. *Campbell v. U.S. Dist. Court*, 501 F.2d  
 28 196, 206 (9th Cir. 1974); *Johnson v. Nelson*, 142 F. Supp. 2d 1215, 1217 (S.D. Cal.

1 2001).

2 **III. DISCUSSION**

3 **A. Injunctive Relief**

4 As an initial matter, it is unclear whether injunctive relief is available to a  
 5 petitioner proceeding under § 2254. *See Adame v. Salazar*, No. 08-cv-2844-JFW-RZ,  
 6 2008 WL 2019599, (C.D. Cal. May 6, 2008); *see also Case v. Miller-Stout*, No. 12-cv-  
 7 0187-MJP-MAT, 2013 WL 104835 (W.D. Wash. Jan. 7, 2013). Even if injunctive  
 8 relief were available, Petitioner has failed to establish that he meets the four necessary  
 9 elements required to obtain such relief. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1108 (9th  
 10 Cir. 2011) (“A preliminary injunction is proper if there is a likelihood of irreparable  
 11 injury to plaintiff; there are serious questions going to the merits; the balance of  
 12 hardships tips sharply in favor of the plaintiff; and the injunction is in the public  
 13 interest.”) (citation omitted). The alleged evidentiary basis of Petitioner’s motion is that  
 14 he has uncovered meanings secretly encoded in certain names, words, and phrases. (*See*  
 15 ECF No. 24.) However, the fact that these names and phrases can be rearranged into  
 16 other names and phrases is not evidence. Therefore the Court finds that Petitioner has  
 17 failed to show any of the four elements required to obtain a temporary restraining order  
 18 or permanent injunction. *See Dreyfus*, 663 F.3d at 1108. Accordingly, the Court  
 19 DENIES Petitioner’s motion for injunctive relief.

20 **B. Report and Recommendation**

21 **1. Objections**

22 Petitioner makes seven objections to the R&R: (1) the California Supreme Court  
 23 found that his state habeas petition was timely; (2) if a state habeas petition is filed  
 24 within the 1 year statute of limitations period, it is timely; (3) he is “entitled to statutory  
 25 tolling while the motion to recall remittitur was properly filed and being considered (29  
 26 days)”; (4) “gap” tolling is inapplicable; (5) that “Petitioner was targeted and attacked  
 27 daily by directed-energy weapons between October 2012 and January 28, 2014” that  
 28 “leave no visible forensic evidence”; (6) that the State has engaged “in an ongoing

1 campaign to worsen Petitioner’s legal plight through intentional and coordinated effort  
 2 to force a procedural default”; and (7) that an evidentiary hearing should be held to  
 3 investigate the legitimacy of the state court documents. (ECF No. 26, at 5–14.)

4 With regards to Petitioner’s fifth, sixth, and seventh objections, the Court does  
 5 not find that there is any evidentiary basis for them. There is no evidence to support  
 6 that the alleged weapons were used against Petitioner, that the State of California has  
 7 attempted to “force” a procedural default, or that the state court documents are  
 8 somehow inauthentic. Additionally, the Court again notes that much of Petitioner’s  
 9 alleged evidence is not actually evidence. (See ECF No. 22 (Petitioner refers to  
 10 “intentional anagrams, covert messages . . . delivered through titles, positions and  
 11 names within official court documents . . .”).) With regards to Petitioner’s fourth  
 12 objection, the Court notes that the R&R does not rely on “gap” tolling, *see Gaston v.*  
 13 *Palmer*, 417 F.3d 1030 (9th Cir. 2005), and thus it is unclear what the basis for  
 14 Petitioner’s objection is. With regards to Petitioner’s second objection, the R&R does  
 15 not dispute that a state habeas petition filed within one year it is timely. The R&R  
 16 specifically finds, however, that it was not filed within one year, (ECF No. 25, at 6),  
 17 and thus it is again unclear what the basis for Petitioner’s objection is. Accordingly, the  
 18 Court OVERRULES Petitioner’s second, fourth, fifth, sixth, and seventh objections.  
 19 The Court now turns to Petitioner’s remaining objections: (1) that his state habeas  
 20 petition was timely, and (2) that he is entitled to tolling during the pendency of his  
 21 motion to recall a remittitur.

22 First, to argue that his state petition was timely, Petitioner relies on *In re*  
 23 *Robbins*, 959 P.2d 311 (Cal. 1998). (ECF No. 26, at 5–6.) In *Robbins*, the California  
 24 Supreme Court stated that “when respondent asserts that a particular claim or subclaim  
 25 . . . is untimely” and the California Supreme Court’s “order disposing of a habeas  
 26 petition does not impose the proposed bar or bars to that claim or subclaim, this  
 27 signifies that we have considered respondent’s assertion and have determined that the  
 28 claim or subclaim is not barred on the cited ground or grounds.” 959 P.2d at 340 n.34.

1 However, for the California Supreme Court to make this determination the respondent  
 2 *in the state habeas case* must assert it. That the respondent in the subsequent federal  
 3 habeas petition makes this argument does not affect the California Supreme Court's  
 4 determination. As the respondent in the state habeas case did not make any arguments,  
 5 let alone argue that it was untimely, (see ECF No. 8-19), the Court finds that the  
 6 California Supreme Court did not consider whether the state habeas petition was timely  
 7 and thus did not find that it was or was not timely. Accordingly, the Court  
 8 OVERRULES Petitioner's objection on this ground.

9 Second, Petitioner argues that his motion to recall a remittitur was part of  
 10 collateral review and that tolling of 29 days is applicable under *Wall v. Khali*, 562 U.S.  
 11 545 (2011). (ECF No. 26, at 7-8.) The R&R distinguished between two types of  
 12 motions to recall a remittitur: (1) where it acts as a habeas petition, or (2) where it  
 13 attempts to reinstate the direct appeal. (ECF No. 25, at 8.) Based on this distinction, the  
 14 R&R found that Petitioner's motion to recall a remittitur was an attempt to reinstate a  
 15 direct appeal because Petitioner "argued that these difficulties excused his failure to  
 16 perfect his appeal." (*Id.*) Petitioner responds that both he and Respondent "concede[]  
 17 that the motion to recall was not a part of the direct review process." (ECF No. 26, at  
 18 8.) However, merely because both parties argue something does not necessarily make  
 19 it true. Moreover, the R&R's finding that Petitioner's direct review in state court  
 20 concluded on March 4, 2013, is not inconsistent with the R&R's determination that the  
 21 motion to recall filed October 1, 2013, was part of the direct review process. (*Id.* at 3,  
 22 6, 8.) The R&R determined that the motion to recall was an attempt to *reinstate* the  
 23 direct appeal, meaning that direct appeal had already concluded. (*See id.* at 8.) The  
 24 R&R further considered the affect of the motion to recall on the statute of limitations.

25 The Ninth Circuit's unpublished decision in *Williams v. Harrison* noted that  
 26 there are two ways that a motion to recall can affect the statute of limitations: (1) by  
 27 reinstating the direct appeal and thus changing the date that the conviction became  
 28 final, or (2) acting as a state habeas petition and thereby tolling the statute of

1 limitations for federal habeas petitions. 368 F. App'x 764, 765 (9th Cir. 2010).  
 2 However, where a motion to recall attempts to reinstate the direct appeal but its claims  
 3 "do not rise to the level of claims of 'judicial error of constitutional dimension  
 4 warranting relief by habeas corpus,'" (ECF No. 25, at 8 (quoting *In re Gray*, 102 Cal.  
 5 Rptr. 3d 551, 557 (Cal. Ct. App. 2009)), there is no affect on the statute of limitations  
 6 because the direct appeal has not been reinstated and the motion to recall is not treated  
 7 as a state habeas petition. *See People v. Mutch*, 482 P.2d 633, 638 (Cal. 1971). *Mutch*  
 8 specifically applies to situations where the motion to recall should be granted because  
 9 "the error is of such dimensions as to entitle the defendant to a writ of habeas corpus"  
 10 which would normally result in the California Supreme Court "retransfer[ing] the  
 11 proceeding to the Court of Appeal with directions to recall its remittitur and reinstate  
 12 the appeal for the limited purpose of ruling on the merits of defendant's claim." *Id.* In  
 13 contrast to *Mutch*, Petitioner's claim in the motion to recall that he was unable "to  
 14 retain private counsel and affidavits regarding the transcript discrepancies . . . prior to  
 15 the dismissal of the appeal," (ECF No. 20-1, at 1–3), does not rise to the level of a  
 16 claim of judicial error that warrants habeas relief. *See Gray*, 102 Cal. Rptr. 3d at 557.  
 17 Accordingly, the Court OVERRULES Petitioner's objection on this ground.

18 Having considered and overruled all of Petitioner's objections and having found  
 19 that Magistrate Judge Stormes's objected findings of fact are consistent with the  
 20 evidentiary record, the Court now adopts Magistrate Judge Stormes's remaining  
 21 findings of fact and turns to the R&R's legal analysis.

22 **2. Analysis**

23 The AEDPA contains a one year statute of limitations for federal habeas  
 24 petitions of state court convictions. 28 U.S.C. § 2244(d)(1). The statute of limitations  
 25 runs from the conclusion of direct review in state court, but is tolled during the time  
 26 during which a properly filed application for state collateral review is pending. *Id.* §  
 27 2244(d)(1)(A), (d)(2). Magistrate Judge Stormes found that Petitioner's conclusion of  
 28 direct review was on "March 4, 2013, 40 days after the Court of Appeal denied his

1 appeal on January 23, 2013.” (ECF No. 25, at 5.) Magistrate Judge Stormes then found  
 2 that, although Petitioner had filed a state habeas petition on March 10, 2014, this  
 3 petition was untimely and thus did not toll the AEDPA’s one year statute of limitations.  
 4 (ECF No. 25, at 6–13); *see also Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001).  
 5 Finally, Magistrate Judge Stormes found that, because neither statutory nor equitable  
 6 tolling applied, Petitioner’s federal habeas petition was untimely because it was filed  
 7 “on August 11, 2014, more than five months after the statute of limitations expired on  
 8 March 4, 2014.” (ECF No. 25, at 9–13.) Based on this, Magistrate Judge Stormes  
 9 recommends granting Respondent’s motion to dismiss. (ECF No. 25, at 13.) Having  
 10 conducted a de novo review of Magistrate Judge Stormes’s legal conclusions, the Court  
 11 finds that the R&R provides a correct and cogent analysis of the timeliness of  
 12 Petitioner’s federal habeas petition. Accordingly, the Court ADOPTS the R&R and  
 13 therefore GRANTS Respondent’s motion to dismiss.

#### 14 **IV. CONCLUSION AND ORDER**

15 For the reasons stated above, **IT IS HEREBY ORDERED** that:

- 16 1. Petitioner’s Motion to File Supplemental Evidence, (ECF No. 27), is  
 17 **DENIED**;
- 18 2. Petitioner’s Motion for Injunctive Relief, (ECF No. 24), is **DENIED**;
- 19 3. Petitioner’s Objections to the R&R, (ECF No. 26), are **OVERRULED**;
- 20 4. Magistrate Judge Stormes’s Report and Recommendation, (ECF No. 25),  
 21 is **ADOPTED**; and
- 22 5. Respondent’s Motion to Dismiss, (ECF No. 7), is **GRANTED**.

23 **IT IS SO ORDERED.**

24  
 25 DATED: September 1, 2015

26  
 27   
 28 HON. GONZALO P. CURIEL  
 United States District Judge